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No. 183

Supreme Court of the United States

OCTOBER TERM, 1962

GREEN TRUCK SALES, INC.,

Petitioner.

vs.

THE HOEGH LINES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

FRANCIS J. GABEL,
Attorney for Petitioner.

NEWELL & CHESTER, and
ROBERT M. NEWELL,
650 South Grand Avenue,
Los Angeles 17, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. .....

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GREEN TRUCK SALES, INC.,

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vs.

THE HOEGH LINES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 9, 1962, rehearing denied March 19, 1962.

Citations to Opinions Below.

The Memorandum Decision of the District Court on liability [R. 62-66] is printed in Appendix B hereto, *infra*, at p. 11. The Findings of Fact and Conclusions of Law and Judgment [R. 75-80] are printed in Appendix B, *infra*, at p. 15. The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. 2, is reported in 298 F. 2d 240.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 9, 1962, Appendix A, p. 9. Rehearing was denied on March 19, 1962, Appendix A, p. 9.

Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. What is the meaning of "discharged from the ship" as used in COGSA Section 1(e)? Specifically, does the "tackle-to-tackle" test apply?

2. Whether, *as a matter of law*, goods offloaded from an oceangoing common carrier onto the shipper's lighter are "discharged from the ship" only after each lighter has been fully laden?

3. Whether the Carriage of Goods By Sea Act, *as a matter of law*, limits a carrier's liability even though the contract of carriage contains no limitation of liability provisions.

4. Whether an ocean common carrier can limit its liability for its own negligence without giving the shipper the choice of a lower freight rate for the lessened protection.

5. Whether the limitation of liability provisions of the Carriage of Goods By Sea Act apply as a matter of law to a contract which was negotiated by the parties without respect to weight, measurement or number of pieces or packages involved in the shipment, and the freight was not calculated upon any existing or customary freight unit.

6. Does a different rule apply when goods are discharged onto a lighter than when they are discharged onto a pier?

Statute Involved.

The statute involved is the Carriage of Goods By Sea Act (referred to herein as COGSA) April 16, 1936, c. 229, Section 1, 49 Stat. 1208, United States Code, Title 46, Sections 1300-1315. Particular reference will be made to COGSA Sections 1(e) and 4(5).

Statement.

In the summer of 1956, Green Truck Sales, Inc., a California corporation, hereinafter referred to as "plaintiff", purchased some surplus heavy construction equipment, including an inventory of unused spare parts, in Aden, Arabia. It contracted with the Hoegh Lines, an ocean-going common carrier, hereinafter referred to as "defendants," to transport the goods from Aden to New York. The plaintiff agreed to pay the defendants as freight a lump sum of $41,500.00, which figure "was negotiated by the parties without respect to weight, measurement, or number of pieces or packages involved in the shipment, and the freight was not calculated upon any existing or customary freight unit." [R. 43.]

The trial court concluded that the contract of carriage as negotiated between the parties did not contain any provision limiting the liability of the defendants: "The defendants' liability is not limited by any . . . provision in the contract of carriage." [R. 80.]

The spare parts, properly packaged and crated, were stowed in the hold of the defendants' ship S. S. HOEGH TRADER at Aden. The vessel arrived in New York on November 13, 1956, just prior to a threatened longshoremen's strike scheduled to commence on Nov. 15, 1956. [R. 78.] The cargo of spare parts was in the same good order and condition that it had been when loaded aboard at Aden.

The defendants desired and insisted that the cargo be discharged before the strike deadline in order that the ship might clear the harbor. [R. 78.] All of the cargo, except the plaintiff's, was discharged simul-

taneously from all five holds of the vessel onto the docks of Jules S. Sottnek & Co., the contracting stevedore. However, different arrangements were made for the plaintiff's cargo.

The defendants required that the plaintiff hire lighters onto which its cargo was to be discharged. The plaintiff's cargo was offloaded by means of the gear of the floating derrick barge COLOSSUS, owned by Merritt, Chapman and Scott, an independent contractor, hired by the defendant for the purpose. The derrick barge came along the seaward side of the HOEGH TRADER. The longshoremen employed by Jules S. Sottnek & Co. secured the tackle of the derrick barge to the cases of spare parts in the hold of the HOEGH TRADER and the cases were then lifted from the hold of the vessel and placed on the lighters, which were in turn tied to the seaward side of the derrick barge. [R. 78.] The plaintiff's cargo was never handled by ship's tackle during the unloading process.

The longshoremen worked around the clock from 8:00 A.M. on November 14, 1956, until approximately 5:30 P.M. on November 15, 1956, the strike deadline. [R. 735-736.] Most of the damage to the spare parts occurred in the early morning hours of November 15. The unloading of the cases of spare parts was not a continuous process of transferring the cases directly from the hold of the HOEGH TRADER to the deck of the lighters. On frequent occasions, the crew of the COLOSSUS would unload the cases of spare parts onto the deck of the COLOSSUS where they would remain until the crew deemed it appropriate to move them from the derrick barge onto the lighters. [R. 552.]

In the rush to clear the cargo before the strike, the defendants' agents subjected the plaintiff's cargo to some very rough handling. Among other things, some cases of spare parts were dropped precipitately onto the lighters. As a consequence, some of the wooden cases were broken open and their contents were damaged and strewn about or lost. In other instances, heavy items were dropped onto cases which had been previously unloaded, causing extensive damage to the spare parts. [R. 79.]

The defendants' agents continued to rush the discharge of the plaintiff's cargo right up to the strike deadline. When the HOEGH TRADER cleared New York, it still had a couple of pieces of the plaintiff's cargo on board. Two lighters laden with damaged cargo strewn about could not be unloaded for two weeks due to the strike during which time the cargo remained in the open and some of it became wet because of rain and moisture. [R. 44.]

The District Court found the defendants' agents negligently discharged the plaintiff's cargo of spare parts and assessed the plaintiff's damages at $76,010.00. It held that "the defendants' liability is not limited by any statutory enactment or *provision in the* contract of carriage" [R. 80 (emphasis added)], and awarded the plaintiff a judgment for the full amount of its damages.

The Court of Appeals reversed the judgment of the District Court holding that COGSA entitled the defendants to limit their liability and remanded the cause for a redetermination of plaintiff's damages. The court below felt that the case turned on whether

plaintiff's cargo had been discharged from the ship." It ruled:

> "We believe that cargo is not discharged within the meaning of COGSA when it is still in the process of being unloaded from a vessel onto a lighter."

The court did not distinguish between cargo that was damaged by being dropped improperly onto the lighter and that which was already on the lighter and damaged by having something dropped onto it nor did it distinguish these situations from that where the cargo had been unloaded first onto the deck of the COLOSSUS and then moved to a lighter. The court brushed all factual differences aside, stating:

> "During the unloading of cargo from the HOEGH TRADER onto a lighter, some cases of spare parts were damaged when dropped on the lighter and other cases, *already unloaded,* were damaged by other portions of the same cargo. In this (sic) situation, we hold that COGSA applies and that the carrier's liability is limited to $500 per package or customary shipping unit. *We attach no significance to the fact that the lighters had been hired by the shipper and that substitute tackle was used to unload the vessel"* (emphasis added).

As authority, the court relied upon a dictum in the English case of *Goodwin Ferriera & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L. R. 192, 141 L. T. R. (N. S.) 494 (K. B. 1929), a case contrary to the decision of this Court in *Krawill Machinery Corp. v. Robert C. Herd & Co.*, 359 U. S. 297, and disregarded several American cases decided subsequent to *Goodwin*, each of which followed the "tackle-to-tackle" test.

Reasons for Granting the Writ.

1. The decision of the Court below is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *In re Petterson Lighterage and Towing Corp.*, 154 Fed. Supp. 461 (S. D. N. Y. 1957) affirmed 253 F. 2d 952:

> "But that Act does not apply of its own force to the period after the cargo has left the ship's tackle."

It is contrary in principle to the decision of this Court in *Krawill, supra*, in which this Court applied the tackle-to-tackle test prior to loading.

2. The decision of the court below erroneously construed COGSA Section 1(e). No prior decision has ever construed "discharged from the ship" to apply beyond the ship's tackle. In *Federal Insurance Company v. American Export Lines* (S. D. N. Y. 1953), the court said:

> "The Carriage of Goods By Sea Act does not apply of its own force to the period after it has left the ship's tackle."

The leading text writer on the subject, Knauth, "Ocean Bills of Lading," at page 145, states:

> "As to the moment of 'discharged from' the ship, there was a settled line of cases before 1936 to the effect that the carrier may terminate its liability at the end of the ship's tackle [citing cases].
>
> "Further cases since 1936 confirm this view [citing cases]. There would seem to be various possibilities depending upon the method of discharge. If ship's gear, booms and tackle are used,

> the moment of discharge from the ship seems to be generally accepted as the moment when the draft is laid down on a lighter or pier, and the hook of the tackle released. *If shore-side derricks or floating cranes are used, the moment would seem to be when such apparatus lifts the draft from the ship's hold or deck.*" (Emphasis added.)

Knauth's analysis cannot be gainsaid. It is consistent with the clear meaning of the Act. The court erred in voting that it makes no difference whether ship's tackle or the tackle of an independent contractor is used to discharge the cargo. If ship's tackle is used, the cargo is in the custody and control of the *ship* until it is released. If a floating derrick's gear is used, the cargo is out of the custody and control of the *ship* once the cargo is lifted from the deck or hold of the ship. The language of section 1(e) clearly limits the application of the statute to the period when the goods are under the custody of the ship, as a physical entity. On the other hand, the owners or operators of that same ship may engage a third person to take custody of the goods from the ship and still be liable to the cargo owner for the negligent acts of their agent. *Cf. Isthmian S. S. Co. v. Calif. Spray-Chemical Corp.* (9 Cir. 1961), 290 F. 2d 486.

Congress did not intend that the courts should expand the clear definitions of the Act so as to insulate a shipowner from liability for the negligent acts of an independent contractor who damages cargo after it has left the ship and from whom the shipowner has a right of indemnity.

Moreover, the decision below gives rise to more questions than it answers. For example, the Court stated:

"Cargo is not discharged within the meaning of COGSA when *it* (sic) is still in the process of being unloaded from a vessel." Does "it" mean the entire cargo or does "it" refer to each unit, parcel, or package comprising the cargo? In the case at bar, is a case of spare parts discharged when "it" is unloaded onto a lighter or must the entire "cargo" being unloaded before "it" is discharged? If so, does "cargo" mean all of the goods that may be unloaded onto a particular lighter or does it mean all of a particular shipper's goods in their entirety?

This question is clearly involved in the case at bar since many cases of spare parts were unloaded onto the deck of the COLOSSUS or of a lighter long before they were damaged.

The court did not give an answer to this question. It stated further: "Some cases of parts were damaged when dropped on the lighter, and other cases, *already unloaded*, were damaged when struck by other portions of the same cargo." Were the cases that had been "already unloaded" "discharged from the ship" within the meaning of COGSA or could they be "discharged" only after all of the "same cargo" had been unloaded? If those "already unloaded" were "discharged from the ship" and the others were not, how is the trial court to limit the liability of the defendants when the broken crates and their contents are hopelessly intermingled?

Finally, if the plaintiff had taken delivery of the cargo on the pier, each case of spare parts would have been "discharged" when it was placed on the pier. The defendants would be liable in full for any damage they subsequently caused to the spare parts. It is illogical and unfair to permit the defendants to limit their li-

ability just because the plaintiff took delivery of the spare parts on a lighter on the opposite side of the ship. A shipper should be able to take delivery of his cargo on a lighter instead of a pier, if he so desires, without having to pay a penalty in the form of lessened protection from the carrier if the latter should damage the cargo while they are on the lighter. Nothing in COGSA ordains such a result.

It is of great importance to all shippers of cargo in maritime commerce that these questions be answered. It is plainly in the public interest that the scope and application of COGSA be settled and that shippers know their rights against a carrier. This is particularly so in our large ports where cargo is frequently unloaded by derrick barges or other instrumentalities other than ship's gear and lighterage is commonplace.

In *Krawill*, the Court ruled that a negligent stevedore could not limit its liability under COGSA. It is equally important that this Court settle the question of whether a carrier can limit its liability under COGSA for the conduct of its negligent agent after cargo has left the custody and control of the ship. The fact is that "discharged from the ship" has never been defined by this Court. The confusion that has resulted from the opinion below can best be resolved by this Court's construing this important definitional clause of COGSA.

3. Based upon substantial evidence, the trial court ruled "the defendants' liability is not limited by any statutory enactment *or provision in the contract of carriage*." [R. 80, Findings of Fact and Conclusions of Law, Conclusion of Law 5, *infra*, Appendix B.] Notwithstanding that the contract of the parties did not pro-

vide for any limitation of liability, the court below ruled *as a matter of law* that COGSA applies to all maritime contracts and that one of the rights of a carrier "is to have the carrier's liability for this period limited to $500 per package or customary shipping unit" (Court of Appeals opinion, *infra*, Appendix B.] This disregards section 5 of the Act which expressly provides that the *carrier* is at liberty to "surrender any of its rights or immunities or increase its responsibility or liabilities" 46 U. S. C. 1305. Moreover, it is hornbook law that a common carrier is not compelled by law to limit its liability. Like all tortfeasors, a common carrier is liable for all of the damage caused to cargo in its custody resulting from its negligence or the negligence of its agent, unless the contract of the parties expressly provides to the contrary. See *United States v. Atlantic Mutual Ins. Co.*, 343 U. S. 236. The effect of the ruling below is to convert the limitation of liability provisions in COGSA from a statutory minimum of liability into a statutory maximum.

> "The purpose of the $500 limitation of liability provision, section (5) of this Section, was to prevent a stipulated value for cargo in a lesser amount and to do away with the then current limits incurred by carriers, usually $100 or a lesser sum, and except for this change in amount did not represent any basic departure from existing law." (Emphasis added.)
>
> *Jones v. The Flying Clipper* (D. C. N. Y. 1953), p. 45.

The decision below clearly conflicts with the decision of this court in *United States v. Atlantic Mutual Ins.*

Co., supra, and the long history of similar cases decided by this court as cited by that decision.

It is probably that the court below did not intend by its rather cryptic decision to reverse this well-settled line of cases. Nevertheless, this is the direct effect of the decision. If for no other reason than to clarify this point, this Court should issue its writ of certiorari and direct the court below to consider the question of whether or not the trial court's conclusion that the defendants' liability was not limited by any provision in the contract was a correct one. In the light of the record below, this question has profound implications and involves such questions as: (1) whether there is substantial evidence to support the finding of the trial court; (2) the evidentiary significance of the custom of the trade [R. 527-528, 572-574]; and (3) whether an ocean carrier must expressly incorporate a limitation of liability clause in the contract of carriage in order to limit its liability.

4. In the case in question, the parties stipulated that "the lump sum freight of $41,500.00 paid by the plaintiff to the defendants for the carriage of the goods in question was negotiated between the parties without respect to weight, measurement or number of pieces or packages involved in the shipment, and the freight was not calculated upon any existing or customary freight unit." [R. 43.] No alternative rate was offered to the plaintiff, and it was conceded by the defendants "that there was no established rate for this sort of cargo between Aden and New York." (Appellants' Reply Br. p. 19.)

Even where the parties properly incorporate a limitation of liability clause in their freight contract, the

cases hold that such an attempt to limit a carrier's liability is ineffective unless the shipper receives some consideration.

Toyo Kisen Kabushiki Kaisha v. Willetts & Co., (C. C. A. Cal. 1927), 17 F. 2d 762;

Transmarine Corp. v. Chas. H. Levitt & Co., (C. C. A. N. Y. 1928), 25 F. 2d 275.

This same rule was applied in the case of the *Petition of Isbrandsten* (C. C. A. N. Y., 1953) 201 F. 2d 281. In this case, the United States Government had contracted with the petitioner to transport ten locomotives from Germany to Korea at an agreed freight of $10,000 per locomotive. As in the case at bar, there was no effective freight rate in existence. The ship caught on fire in Genoa, Italy, and the cargo was completely destroyed. The carrier filed a petition to limit its liability to $500 per locomotive. The Court of Appeals for the Second Circuit reiterated the rule of law stated above at page 285:

> "But clauses so limiting liability have been held not contrary to public policy preventing carriers from exonerating themselves for liability for negligence *where an opportunity to pay a higher rate and secure a higher valuation has been afforded.* (Emphasis added.)"

The court limited the carrier's liability in *Isbrandsten* because of the language of the bill of lading. The opinion below conflicts in principle with the ruling in *Isbrandsten*.

However, this conflict is not apparent from a reading of the decision because the court below did not consider this point in its opinion.

This is important because, if it be the law that where the parties expressly incorporate a limitation of liability provision in their contract, it will be of no consequence unless there is an alternative rate or some other consideration available to the shipper, the rule should apply with at least equal if not greater force where the contract contains no limitation of liability clause at all. It would be appropriate for the court to issue a writ of certiorari directing the court below to pass on this issue.

5. The court below noted that the contract was negotiated without respect to weight, measurement or number of pieces or packages involved in the shipment and was not calculated upon any existing or customary freight unit. Nevertheless, it applied the limitation of liability section of COGSA, section 4(5). The decision of the court below, the first to pass on this question is believed to be erroneous on this question. It is submitted that a fair reading of the section indicates that the $500 per package limitation was intended to apply only in those instances in which the carrier charged its customary and existing freight rate in which a fixed amount of freight is charged per unit of weight or cubic measure. There is no reason to apply any limitation of liability, *as a matter of law*, where a shipper and a carrier negotiate a contract face-to-face without reference to existing freight rate and where the contract does not expressly limit the carrier's liability.

The implications of this point, which comes before this Court as an original proposition, are clear. It is of importance to all shippers in maritime commerce who, like the plaintiff, ship goods for which there are no existing freight rates or where the circumstances

of the shipment involve the negotiation of a lump-sum freight rate. In negotiations of this kind, the shipper must necessarily be at a considerable disadvantage. As Justice Clark stated in *United States v. Farr Sugar Corp.*, 191 F. 2d 370, p. 374, footnote 4, ". . . if ever there may be unsophisticated strays among admiralty litigants, it would seem that they must be among shippers, not all of whom will know the rules. . . ." Many shippers, such as the plaintiff's officers who negotiated face-to-face with the carrier, can scarcely be expected to know about the odious doctrine of limitation of liability, unless, like the plaintiff, they have lost a case on this ground. It is unrealistic and unfair to impose a limitation of liability upon such people, where the contract does not expressly provide for it.

The last three points, points 3, 4, and 5, are all bound up in the more fundamental question of whether, when the contract of carriage does not provide any limitation of liability, the carrier may nevertheless limit his liability under COGSA. Reduced to its fundamentals, the question is simply whether limitation of liability applies inexorably to all maritime contracts or whether the law remains as it always has been: that a carrier may limit its liability by contract but not below the amount set forth in COGSA Section 4(5), *cf. McCallister v. Skibs* (C. A. 9, 1958), 260 F. 2d 281.

Conclusion.

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted.

FRANCIS J. GABEL,
Attorney for Petitioner.

NEWELL & CHESTER, and
ROBERT M. NEWELL,

APPENDIX A.

Proceedings in the U. S. Court of Appeals for the Ninth Circuit.

Transcript of Record
in Two Volumes
Vol. II
in the
Supreme Court of the United States
October Term, 1961
No. .....

Green Truck Sales, Inc., Petitioner, vs. The Hoegh Lines, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Court of Appeals for the Ninth Circuit.

The Hoegh Lines, Appellant, vs. Green Truck Sales, Inc., Appellee. No. 17237.

Appeal from the United States District Court for the Southern District of California Central Division.

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, November 6, 1961.

Before: Barnes and Hamlin, Circuit Judges, Solomon, District Judge.

ORDER OF SUBMISSION

This cause coming on regularly for hearing or submission, Mr. L. Robert Wood argued for the appellant and Mr. Robert M. Newell, argued for the appellee and thereupon the Court ordered the cause submitted for consideration and decision.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, January 9, 1962.

Before: Barnes and Hamlin, Circuit Judges, Solomon, District Judge.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court inabove cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

United States Court of Appeals for the Ninth Circuit.

The Hoegh Lines, Appellants, vs. Green Truck Sales, Inc., Appellee. No. 17,237, Jan. 9, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Hamlin, Circuit Judges, and Solomon, District Judge.

Solomon, District Judge:

The Hoegh Lines appeal from a judgment in favor of Green Truck Sales, Inc., for damages to spare truck and crane parts shipped on the HOEGH TRADER from Aden, Arabia, to the Port of New York.

Green Truck Sales, appellee, is a California corporation which deals in surplus heavy equipment throughout the world. In May, 1956, it purchased from agents for the British Petroleum Company, Ltd., at a fraction of their original cost, eight Lima cranes and seven heavy trucks, in addition to a large quantity of new and used spare parts. In negotiating with appellants' general agents, the Kerr Steamship Company, appellee offered to pay $34,000.00 for the carriage of the equipment and spare parts from Aden to New York. The appellants accepted the offer, but the freight charge was increased to $41,500.00 when two additional cranes and three more trucks were added. The freight was not calculated upon any existing or customary freight unit with respect to weight, measurement, or number of cases or packages.

The spare parts which are the subject of this appeal were packed in wooden cases prepared under appellee's direction and were carried below deck on the HOEGH TRADER. They were damaged while the vessel was being unloaded by the floating derrick, COLOSSUS, in the New York harbor. The floating derrick was employed by the HOEGH TRADER because the vessel's own tackle was incapable of handling the items of heavy equipment belonging to the appellee. The cases of spare parts were lifted from the hold of the vessel by the COLOSSUS and placed on lighters hired by appellee at appellants' suggestion. When the unloading was completed, the lighters were towed to Newark, New Jersey, for delivery of the cargo to appellee.

The District Court found that some of the cases of spare parts were dropped onto the lighters and that pieces of appellee's heavy machinery were dropped onto cases of spare parts already unloaded. As a result of this negligent unloading, many cases were broken open and the spare parts damaged or lost. The District Court held that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, did not apply because the parts had been discharged before they were damaged, and that the vessel's liability was not limited to $500 per package or customary shipping unit under 46 U.S.C. § 1304(5). The court awarded plaintiff judgment for $76,010.00 based upon the difference between the reasonable market value in New York of the parts as delivered and their value if undamaged, and upon the reasonable expenses incurred by the appellee in selling the damaged parts.

Appellants contend that the District Court's findings on liability and damages are clearly erroneous, and in any event the appellants' liability is limited to $500 per package by 46 U.S.C. § 1304(5).

I.

The evidence and the inferences that must necessarily be drawn from it support the trial court's finding that appellants negligently unloaded the spare parts. There was testimony that cases of spare parts were dropped precipitously onto the lighters and that heavy machinery was dropped on cases of spare parts which had previously been loaded on the lighter JEANNE and that many of such cases were broken and their contents strewn about the lighter. The cargo appeared so badly damaged when the lighter reached Newark, New Jersey, that the pier superintendent refused to per-

mit it to be unloaded until pictures of the cargo had been taken. These pictures showed numerous broken cases and damaged parts.

Appellants' testimony that there was no mishandling in the unloading operations and that there was little or no damage to the spare parts was not convincing. We cannot say that the District Court erred in refusing to believe it.

II.

The Carriage of Goods by Sea Act defines the term "carriage of goods" as "the period from the time when the goods are loaded on to the time when they are discharged from the ship."[1] For this period the carrier is "subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in Sections 1303 and 1304" of the Act.[2] One such right is to have the carrier's liability for this period limited to $500 per package or customary shipping unit.[3]

We believe that cargo is not discharged within the meaning of COGSA when it is still in the process of being unloaded from a vessel onto a lighter. We reject the view of the trial court that each case of spare parts was discharged when it was first lifted from the hold of the vessel by the tackle of the floating derrick COLOSSUS. In *Remington Rand v. American Export Lines*, S.D. N.Y. 1955, 132 F.Supp. 129, the court held that COGSA's exemption of a carrier from liability for fire did not apply to cargo which had been fully loaded onto a lighter for 24 hours. The court

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[1]46 U.S.C. § 1301(e).
[2]46 U.S.C. § 1302.
[3]46 U.S.C. § 1304(5).

stated that discharge onto a lighter is complete "when the loading has been completed or while no other cargo is being loaded into the same lighter." 132 F.Supp. 129, 137. In considering when cargo is discharged, the court cited the English case of *Goodwin Ferreira & Co. v. Lamport & Holt, Ltd.*, 34 Lloyd's List L.R. 192, 141 L.T.R. (n.s.) 494 (K.B. 1929), which construed the discharge provisions of the English Carriage of Goods by Sea Act, which are identical in this respect with the American Act. There, a piece of machinery fell through the bottom of a lighter during the unloading of a vessel and caused water damage to libelant's cotton yarn. The court in holding that the yarn was damaged prior to discharge stated:

> "In my judgment the discharge of these goods was not finished when they were put into a lighter when other goods were being discharged into the same lighter to make up the lighter load which was to start for the shore. When it is contemplated that these goods are to form the lighter load with other goods, the discharge of the goods themselves within the meaning of the Act of Parliament is, in my judgment, going on so long as other goods are being raised into the lighter and stowed into the lighter alongside or on top of them." 141 L.T.R. (n.s.) at 496.

This decision was cited with approval in the more recent case of *Pyrene Co. v. Scindia Navigation Co.*, 2 Q.B. 403 (1954), 2 All E.R. 158.

The only case which holds that cargo has been discharged although it is still being unloaded onto a lighter is *Federal Insurance Co. v. American Export Lines*, S.D. N.Y. 1953, 113 F. Supp. 540. There, the ship-

per's libel was filed more than one year after the accident and the carrier contended that the action was barred by COGSA's one-year statute of limitations.[4] The court held that the cargo had been discharged and that the short statute of limitations in COGSA did not apply. This decision is inconsistent with both the *Remington Rand* and *Goodwin Ferreira* cases, supra, and, in our opinion, is an unduly restrictive interpretation of COGSA.

The other cases cited by the District Court and by the appellee are not inconsistent with our view that the spare parts on the lighter had not been discharged at the time they were damaged. *In Re Petterson Lighterage and Towing Corp.*, S.D. N.Y. 1957, 154 F.Supp. 461, involved an unseaworthy lighter which careened against the vessel and damaged the cargo on the lighter several hours after it had been fully loaded. *Krawill Machinery Co. v. Robert C. Herd & Co.*, 359 U.S. 297 (1959), rejected a claim that COGSA limited a stevedore's liability. *Mackey v. United States*, S.D. N.Y. 1948, 83 F.Supp. 14, held that because of a contract COGSA was applicable before the cargo had actually reached the ship's tackle. On appeal, the court affirmed solely on the ground that the cargo had been accepted for transportation and was subject to the ship's control. 197 F.2d 241, 243.

Knauth, in Ocean Bills of Lading (1953), at p. 145, states that when substitute tackle is used, cargo is discharged as soon as it is lifted from the hold of the vessel. However, he cites no cases to support this statement. Knauth also states that a settled line of

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[4] 46 U.S.C. § 1303(6).

cases before and after the enactment of COGSA have held that a ship's liability terminates at the end of the ship's tackle, but the cases he cites are not in point.[5]

During the unloading of cargo from the HOEGH TRADER onto a lighter, some cases of parts were damaged when dropped on the lighter and other cases, already unloaded, were damaged when struck by other portions of the same cargo. In this situation, we hold that COGSA applies and that the carrier's liability is limited to $500 per package or customary shipping unit. We attach no significance to the fact that the lighters had been hired by the shipper and that substitute tackle was used to unload the vessel.

In view of this holding, we will not discuss appellants' contention that COGSA was applicable by contract to the period after discharge.

The judgment is vacated and the case remanded for a redetermination of the damages in accordance with this opinion.

The parties shall bear their own costs in this court.

(Endorsed) Opinion Filed Jan. 9, 1962.

Frank H. Schmid, Clerk.

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[5] *Smith v. Britain*, S.D. N.Y. 1903, 123 Fed. 176; *The Portuguese Prince*, S.D. N.Y. 1913, 209 Fed. 995; and *Home Insurance Co. v. Philadelphia Piers*, Pa. 1951, 100 F.Supp. 348; all held that a vessel was not liable for water damage to cargo after discharging it onto a pier; *The Monte Iciar*, 3 Cir. 1948, 167 F.2d 334, held that COGSA was not applicable where several barrels of sherry first showed evidence of leakage a day or so after being discharged onto a pier; *Bank of California v. I.M.M. Co.*, 1933 A.M.C. 719 (2 Cir.) held that an ocean carrier was not liable for an admitted misdelivery of cargo because the shipper failed to comply with the notice provisions of the bill of lading; *The Lopez y Lopez*, 1927 A.M.C. 275, 218 N.Y.A.D. 660, held that a carrier was not liable for leakage of olive oil where there was no evidence of negligence.

United States Court of Appeals, for the Ninth Circuit.

The Hoegh Lines, Appellants vs. Green Truck Sales, Inc. Appellee. No. 17237.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is vacated, and the cause be, and hereby is remanded to the District Court for a redetermination of the damages in accordance with the opinion of this Court.

The parties shall bear their own costs in this Court.

Filed and entered January 9, 1962.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, March 19, 1962.

Before: Barnes and Hamlin, Circuit Judges, Solomon, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof and by direction of the Court, It Is Ordered that the petition of appellee, filed March 9, 1962, and within time allowed therefor by rule of court, and valid extension thereof, for a rehearing of above cause be and hereby is denied.

United States Court of Appeals for the Ninth Circuit.

The Hoegh Lines, Appellant, vs. Green Truck Sales, Inc., Appellee. No. 17237.

CERTIFICATE OF CLERK, US COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Frank H. Schmid, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing transcript of record, in two volumes, containing seven hundred and eighty-five (785), numbered from and including 1 to and including 785, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of court for the appellee and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-ninth day of May, 1962.

Frank H. Schmid, Clerk.

APPENDIX B.

Memorandum Decision on Liability and Findings of Fact and Conclusions of Law and Judgment.

Partial Record of the U. S. District Court for the Southern District of California

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Plaintiff, the owner of certain machinery and spare parts, contracted with defendants for carriage of these chattels from Aden, Arabia, to the port of New York. The cargo was properly packed and delivered to the defendants' ship, "HOEGH TRADER." Some of the large, heavy machinery was to be carried, and was carried, as deck cargo. The spare parts and smaller pieces of machinery were crated and stowed in the cargo holds of the vessel.

Enroute to New York the ship encountered some exceedingly rough weather. A hurricane of sufficient magnitude to be named[1] influenced the heavy weather unfavorably and some of the deck cargo was washed overboard, taking with it a section of the ship's railing. Other items of deck cargo were damaged by the movement of the machinery as it left the space to which it had been firmly lashed. The Court finds that the damage to the part of the deck cargo which was damaged and the total loss of other deck cargo was caused solely by act of nature and plaintiff cannot recover from defendants for that loss.

The crated cargo arrived safely in the Port of New York. Longshoremen then undertook to unload it.

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[1] "Greta"

With minor exceptions (not here involved) it was lifted from the vessel by a derrick barge and loaded on board lighters.

The unloading occurred shortly before a scheduled strike of longshoremen. In the rush to clear the vessel before onset of the strike, cases of spare parts were dropped onto the lighters. Some cases were thereby broken open. Some heavy items were dropped onto cases which had been unloaded. Extensive damage resulted. Although some of the personnel testified to orderly, careful, uneventful unloading, it is apparent that they actually narrated the usual standard of practice employed in their calling and did not accurately describe the negligent unloading which actually occurred in this case. Said cargo was mishandled and the handlers were guilty of negligence. The evidence is overwhelming in favor of plaintiff upon this point.

Defendants assert that even if this is so, plaintiff is limited in recovery to $500.00 damages to any one case because of the provisions of the Carriage of Goods By Sea Act, sometimes designed "Cogsa."[2]

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[2]Title 46 U.S.C. §§ 1300-1315. The $500 per package valuation provision is § 1304(5).

Section 1300 makes the Act applicable to all agreements ". . . for the carriage of goods by sea to or from ports of the United States, in foreign trade . . ."

Section 1301 defines the terms of the Act:

"'When used in this chapter—

"(a) the term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

"(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading

Neither the statutory language nor the adjudications support application of Cogsa to this case.

The definitional section of the Act provides, "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship". The only goods in the instant case which were adversely affected during that time were those lost or damaged because of the extraordinarily turbulent weather. Defendants have been absolved of responsibility in that regard.

The cargo which had been carried in the vessel's holds had been removed from the ship in sound condition. The damage thereto was not damage which occurred in carriage of goods by sea, but damage which resulted from mishandling in the unloading operation. The statute states "when they are discharged from the ship" as the termination of the time that Cogsa applies. The leading text writer on the subject, Knauth, says, "If shore side cranes or floating derricks are used, the moment (of discharge) would seem to be when such apparatus lifts the draft from the ship's hold or deck."[3]

The unloading method employed in the transaction in suit was exactly that. More impressive than the

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or similar document of title regulates the relations between a carrier and a holder of the same.

"(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

"(d) The term 'ship' means any vessel used for the carriage of goods by sea.

"(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Apr. 16, 1936, c.229, § 1, 49 Stat. 1208."

[3]Knauth, Ocean Bills of Lading, Page 145 (1953).

treatiese are the many cases which apply the same rule, and hold that Cogsa is no longer in effect when the cargo has gone beyond the ship's own tackle. In Remington Rand, Inc. v. American Export Lines,[4] Cogsa was held not to govern after the cargo was loaded onto lighters. The Court stated:

"'Discharged from the ship' in Subsection (e), Section 1 of the Carriage of Goods by Sea Act is accomplished by the act of transferring cargo from the main carrier to a chartered lighter. . . . The lighters hired by respondent on which libellants' cargo was loaded at the time of the fire were not 'ships' within the purview of the Carriage of Goods by Sea Act. . . ." Also in point are In re Petterson Lighterage & Towing Corporation[5]) "But, that Act does not apply of its own force to the period after cargo has left the ship's tackle"), and Federal Ins. Co. v. American Export Lines[6] ("The Carriage of Goods by Sea Act does not apply of its own force to cargo after it has left the ship's tackle"). Compare for applications of this "tackle to tackle" test prior to loading, Krawill Machinery Corp. v. Robert C. Herd & Co.,[7] and Mackey v. United States.[8]

This is clearly a case in which sound cargo left the ship via the stevedores' tackle. Damage occurred when it was roughly handled by those in charge of the unloaders' equipment.

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[4]132 F. Supp. 129, 137 (S.D.N.Y. 1955).

[5]154 F. Supp. 461, 467 (S.D.N.Y. 1957), aff'd 253 F.2d 952 (2d Cir. 1958).

[6]113 F. Supp. 540, 542 (S.D.N.Y. 1953).

[7]145 F. Supp. 554 (D.Md. 1956), aff'd 359 U.S. 297 (1959).

[8]83 F. Supp. 14 (S.D.N.Y. 1948), aff'd 197 F.2d 241 (2d Cir. 1952).

Damages must, therefore, be awarded plaintiff. The details of evidence with respect to the damage problem should be argued before the Court fixes the damages.

January 18, 1960, at 2:00 P.M., is set as the time for hearing that argument. Submission of Findings, etc. will await decision following the requested argument.

Dated: January 4, 1960.

ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed Jan. 4, 1960.

In the United States District Court in and for the Southern District of California, Central Division. No. 1264-57T Civil.

Green Truck Sales, Inc., Plaintiff, vs. The Hoegh Lines, Leif Hoegh & Company, and Kerr Steamship Company, Inc., Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT.

The above entitled cause having come on regularly for court trial in this court before Ernest A. Tolin, United States District Judge, plaintiff appearing by its attorneys, Newell & Chester, by Robert M. Newell, Esq., and defendants appearing by their attorneys, Lillick, Geary, McHose, Roethke & Myers, by L. Robert Wood, Esq., and oral and documentary evidence having been produced, and the cause having been submitted to the court for decision, the court, being fully advised in the premises, now makes the following find-

ings of fact and conclusions of law, and renders the following judgment.

The court directs attention to the two Memoranda of Decision heretofore filed in this case, it begin the intent of the court that such Memoranda are to augment and supplement these findings and conclusions. Certain mathematical errors appear in the "Memorandum of Decision on Amount of Damages to be Awarded Plaintiff," dated May 23, 1960. The correct amounts are stated in the findings of fact.

Findings of Fact

1. The plaintiff, Green Truck Sales, Inc., is a California corporation, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

2. The defendants Skibs A/S Abaco, Skibs A/S Astrea, Skibs A/S Aruba and Skibs A/S Noruega are Norwegian corporations which at all times pertinent hereto owned and operated the SS HOEGH TRADER acting by and through Leif Hoegh & Company A/S, a Norwegian corporation.

3. Prior to October 18, 1956, and at all times relevant hereto, the plaintiff was the owner of the cargo which was the subject of the litigation herein involved. Said cargo included 10 Lima cranes, 10 trucks, 520 miscellaneous crane attachments and accessories, and a quantity of crane and truck spare parts (hereinafter referred to as "spare parts"), which it had purchased in the Summer of 1956 from the British Petroleum Company at the Protectorate of Aden. The plaintiff and the defendants, acting through their duly appointed agents, entered into a contract for the carriage of the

plaintiff's aforementioned cargo from the Port of Aden to the Port of New York.

In general, the contract of carriage provided that the defendants would transport the plaintiff's cargo from Aden to New York aboard the SS HOEGH TRADER and discharge it from the ship and deliver it to the plaintiff at the Port of New York. In turn, the plaintiff agreed to and did in fact pay to the defendants freight of an agreed lump sum of $41,500.00 for the carriage of said cargo.

4. The lump sum freight charge of $41,500.00 was negotiated by the parties without respect to weight, measurement or number of packages involved in the shipment, and the freight was not calculated upon any then existing or customary freight unit.

5. In October, 1956, the plaintiff delivered the spare parts to the defendants at Aden for shipment to New York in an undamaged condition. The bulk of the spare parts were new and unused and were in the packages in which they were originally placed by the manufacturer. Prior to delivery of the spare parts to the defendants at Aden, the plaintiff had carefully inventoried each of the spare parts and had packaged them in sturdy, wooden cases which were in all respects sufficient for the contemplated shipment. At Aden the plaintiff separated the top from the base of each of the 10 Lima cranes, and the 10 crane bases and 10 crane tops were loaded on the deck of the SS HOEGH TRADER with the knowledge, approval and consent of the plaintiff and in accordance with the contract of carriage. The trucks and spare parts were stowed below deck by the defendants.

6. On October 18, 1956, the SS HOEGH TRADER left Aden bound for New York. On or about November 5, 1956, while en route, the ship encountered exceedingly rough weather, which was influenced and aggravated by the hurricane "Greta." As a result of this unexpected and violent storm, one of the Lima crane tops washed overboard and in the process of going overboard damaged two other Lima crane tops.

7. The SS HOEGH TRADER arrived in New York on November 13, 1956. At the time of arrival, the crated cargo, including the spare parts, was in the same condition as it had been when loaded aboard the vessel in Aden.

8. The defendants undertook, through their appointed agents and representatives, to discharge the cargo from the vessel. The discharge was effected by longshoremen employed by Jules S. Sottnek Co., Inc., contracting stevedore, and by means of the floating derrick barge COLOSSUS, owned by Merrit, Chapman & Scott Corporation, the services of said stevedore and floating derrick barge having been contracted for by the defendants. The longshoremen in the holds of the SS HOEGH TRADER secured the tackle of the derrick barge to the cases of spare parts and the cases were then lifted from the holds of the vessel by the derrick barge and placed on lighters, which the plaintiff had engaged at the defendants' suggestion for that purpose.

9. The defendants were aware that a longshoremen's strike in the Port of New York was scheduled to commence on November 15, 1956. For that reason, the defendants desired and insisted that the cargo be

entirely discharged prior to the strike deadline. The discharge of the plaintiff's cargo commenced on the morning of November 14, 1956, and proceeded continuously around the clock until the late afternoon of November 15, 1956.

10. The defendants through their agents and representatives negligently discharged and unloaded the plaintiff's cargo of spare parts. Among other things, in the rush to clear the cargo before the onset of the strike, cases of spare parts were dropped precipitately onto the lighters. As a consequence, some of the wooden cases were broken open and their contents were damaged and strewn about or lost. In other instances, heavy items of cargo were dropped onto cases which had been previously unloaded, causing extensive damage to the spare parts.

11. As a result of the acts of the defendants, the cargo of spare parts was substantially and extensively damaged.

12. At the time of the arrival of the SS HOEGH TRADER in the Port of New York on November 13, 1956, the reasonable market value of the cargo of spare parts was $109,225.00. The reasonable market value of the spare parts in their damaged condition after the negligent discharge by the defendants was $38,215.00. The plaintiff incurred reasonable expenses in attempting to minimize its damage and salvage the cargo in the sum of $5,000.00.

13. During the discharge of the cargo, the plaintiff gave the defendants oral notice that the cargo had been and was being damaged during discharge. In addition, the plaintiff gave the defendants written notice of its claimed loss and damage.

Conclusions of Law

From the foregoing findings of fact, the court makes the following conclusions of law:

1. This court has jurisdiction of the action by reason of 28 U.S.C. §1332.

2. The loss of the crane top referred to in finding of fact No. 6 and the damage occasioned by its going over the side were due solely to an act of nature which constituted a peril of the sea, for which loss and damage the defendants are not responsible.

3. The plaintiff exercised reasonable care to protect, preserve and salvage the damaged cargo after its discharge and made a reasonable and successful effort to minimize its damage.

4. The defendants' actions in unloading the cargo constituted actionable negligence. As a direct and proximate consequence of this negligence, plaintiff was damaged in the sum of $76,010.00.

5. The defendants' liability is not limited by any statutory enactment or provision in the contact of carriage.

Judgment .

In accordance with the foregoing findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed that plaintiff Green Truck Sales Inc., recover from defendants Skibs A/S Abaco, Skibs A/S Astrea, Skibs A/S Aruba and Skibs A/S Noruega the sum of Seventy Six Thousand Ten and no/100ths Dollars ($76,101.00), together with its costs of suit incurred herein in the sum of $37.40.

Dated: This 16th day of June, 1960.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed and Entered June 16, 1960.